In the Supreme Court of the United States,

October Term, 1905.

JAMES D. SHIVER, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

No. [illegible]
(No. 2413.)

On certificate from the United States Circuit Court of Appeals, for the Fifth Circuit.

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JAMES D. SHIVER, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

No. 934,
(No. 548.)

BRIEF OF PLAINTIFF IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR.

In view of the questions certified to this Court by the Circuit Court of Appeals for the Fifth Circuit, it was not believed that any other questions that might arise in the cause would be considered by the Court. Counsel for Plaintiff in error, therefore, sought only to give such a brief statement of the facts set out in the record as might make it clear to the Court that such questions so certified logically arose in the cause. An examination of the record will show that all of the timber cut and exchanged from his entry by plaintiff in error was so exchanged for lumber and building material, and that his buildings, improvements, were valued at more than the fair market price of said timber so cut and exchanged. (Rec. pp. 5, 6, 7), The trial Judge, in his charge to the jury, (Rec. p. 7), seemed to confine the improvements to the lumber that certain trees would produce, and not as the decided cases commencing with United States against Cook, 19 Wallace, 569, would seem to hold; namely, that an improvement is "a beneficial addition or an increase of value, as by the cultivation of land, the erection or repair of buildings:

betterments." "Work done or things completed or placed upon land, rendering it more fit for use and more capable of producing anything."

Worcester, Bouvier, Burrill, and Blacks Dictonaries, vol. 10 American and English Enc. Law.

In other words, that improvements comprehend the erection of buildings, including labor and all material that enter into them. The digging of wells, making of clearings, and fences, etc., etc.

United States vs. Lane, 19 Fed. Rep. 910.
United States vs. Freyberg, 32 Fed. Rep. 196.
United States vs. Murphy, 32 Fed. Rep. 376 to 379, and cases cited.

The learned counsel for the United States seems to misapprehend the precise questions before the Court. They are not whether the homestead entryman acquires a vested right, as against the United States by his entry; nor whether he has a lawful right to dispose of timber for sale or traffic. The rule deduced from the cases cited by him conforms to the decisions of the General Land Office, that the homesteader may cut unlimited timber from his entry for improvements; but can not cut any merely for traffic and sale. But if he cut for traffic and sale, under the questions certified, is the remedy for that act found in the provisions of 2461, Revised Statutes?

Down to the decision of United States against Briggs, 9 How. p. 171, the penalty denounced by said section or the Act of 1831, was the cutting of timber, useful for the Navy of the United States, against the authority of the Navy Department, and after said decision, twenty odd years elapsed, before the provisions of said section were invoked to sustain a prosecution against a homesteader for cutting or removing timber from his entry. It is not contended that the homesteader has the unlimited use of the timber growing upon his entry. But that for any abuse of his privileges, the remedy lies in the action of waste, by injunction, in a prosecution for perjury as the seventh section of the Homestead Act provides, and in the cancellation of his entry.

The Government possesses a vested interest in the lands covered by military reservations, and embraced in the public parks. Yet it will not be pretended that a person cutting timber upon

a reservation, or in the parks can be prosecuted under 2461. Under the rules and regulations of the Land Office, a vested interest in a homesteader is complete when he makes his final proof and obtains his final certificate. And this vested interest may be acquired through the Land Department, at any stage of a prosecution after the expiration of fourteen months, regardless of what the Courts may attempt to do.

In Caha against the United States, 14 Supreme Court Reporter, 513, it is said that the rules and regulations of the General Land Office made in conformity to sections 444 and 2478 R. S. "*become a mass of that body of public records of which the Courts take judicial notice.*" An inspection of said records will show that on the 16th day of August, 1895, certificate number 25591 was delivered to plaintiff in error, and is in the following words, to wit:

(4—131.)

"*Duplicate number*, 25591.

Receiver's Office at Montgomery, Ala.
Aug. 16, 1895.

Received from

James D. Shiver of Monroe County, Alabama the sum of two hunered dollars and cents, *being in full for the North East quarter of section number* 34 *in Township, number* 6, *North of Range No.* 6, *East, containing* 160 16.100 *acres, and ten one hundredths, at* $ *per acre.*

L. W. Hunter.
Receiver."

On the margin:

"*Com. Under section* 2301, *R. S. from Hd* 29001. *Excess receipt* 25228";

This shows that in utter disregard of any proceedings in the Courts, the Land Department, exclusively charged with the duty of making appropriate rules and regulations to carry out the homestead law, has found that the plaintiff in error has fulfilled every requirement of the law, and, by so doing, is entitled to a patent for his entered land.

"*A right to a patent is equivalent to one issued.*"
Stark vs. Starr, 6 Wall, 418.

"*When in fact the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants.*"

Ibid.

Hence we have the Government seeking to enforce penalities against, and the imprisonment of a citizen for cutting the timber upon a homestead entry, wherein he has acquired *a vested right, entitled himself to the Government's patent, and for the use of timber belonging to himself.*

December 15th, 1885, Mr. Sparks, Commissioner of the General Land Office, by the approval of Secretary Lamar, issued to Registers and Receivers of United States Land Offices and Special Agents of the General Land Office, the following circular: to wit: "The following rules and regulations are hereby prescribed by the Secretary of the Interior, for the protection of the timber growing or being upon public lands covered by homestead or pre-emption entries. * * * * * * Where it is claimed that timber is being cut upon homestead or pre-emption claims, for the purpose of sale or disposal, a special agent must promptly and personally investigate the same and report in full the facts in connection therewith to this office, on the form provided for that purpose. He must also make a separate report on the entry involved in accordance with the general instructions to the special agents appointed to investigate fraudulent land entries. * * * * * * being careful to note on the briefing fold of each report a reference to the relative report. * * * * * * If it is alleged in any case, that the timber was cut to clear the land preparatory to cultivation, the agent should particularly examine and report whether the clearing was done in the manner usual in such cases, or as is customary where timber is cut for the removal, without expectation of cultivating the land; whether valuable timber was culled out, leaving the inferior trees and the under-growth and stumps undisturbed, except as incidental to the removal of the cut timber; whether the land is really fit for agricultural purposes and if so whether it has been cultivated or prepared for cultivation, after the removal of the timber, ascertaining and reporting the nature and extent of any such cultivation; the kind of crops raised, and their amount of value. * * *

In other paragraphs of the same circular, which was re-issued,

Feb. 18, 1890, and is now in force, instructions are given, showing the timber that homestead and pre-emption claimants may properly cut, what will follow abandonment of a settlement claim, after the timber has been removed; and what must be done in case the timber is purchased by mill owners and lumbermen and others. In brief, full and complete directions are given through the said Land Officers for the guidance of those entering lands under the homestead laws, and comparison of the instructions thus given with the decisions cited by counsel for the Government, will show that the Courts, in defining what, in their judgment, a homesteader may do upon his entry, merely follow the instructions issued from the General Land Office, and in the main their opinions of what may be lawfully done upon the homestead entries are not questioned. Nor is that in issue in this cause under the questions certified by the Circuit Court of Appeals. Certainly Congress has the power to dispose of the public lands in such manner as it may deem wise and proper, and has the power also to create the machinery by which any portion of the public soil is transferred from the United States to the individual citizen. The contention is that Congress has provided such machinery in the Homestead Act, and having constituted the Commissioner of the General Land Office and the Land Department a special tribunal for that purpose, that no other tribunal has cognizance of the matter.

It is not contended that the Land Department possesses criminal jurisdiction or that by itself it can excercise criminal jurisdiction. But it is maintained that over homestead entries and pending said entries it has jurisdiction to determine the good or bad faith of the entryman, and that the timber act of 1831, applying exclusively to the unappropriated lands of the United States can have no field of operation upon lands that are thus appropriated. In no other manner could uniformity in the administration of the homestead laws be secured.

The pertinency of the citation by counsel for the Government, from page 12 to page 27, of his brief, to the precise issues raised by the questions certified to the Court, is not perceived. Hence extended comment upon the same is deemed unnecessary.

But, United States vs. Yoder, 18 Fed. Rep. 272, is cited with approval in the Government's brief, pp. 19 and 20. The facts of

that case show that Yoder, six months prior to his entry of the land, cut and sold to a mill company *one hundred and ten thousand feet of pine logs, (or one million three hundred and twenty thousand feet of lumber). That the cutting was for the improvement of the entry. The agreed statement of facts is silent on the question of cultivation of his entry by Yoder.* Plaintiff in error cut about *twelve thousand feet of logs,* or *one hundred and fifty thousand feet of lumber,* (Rec. p. 5), being about one-eighth of as much timber as was cut by Yoder. Said cutting was after the entry, and the timber was wholly exchanged for lumber and building material, shown to have been upon the premises at the date of prosecution. (Rec. pp. 4, 5, 6). *Certainly no greater right to cut timber on the land could exist before entry than existed after entry. The homestead law is the same in Alabama as in Minnesota.* Shall the homesteader be guided by the rule laid down in the case of Yoder whose act was found to be lawful as determined by Nelson (D. Ct. J.); or by the rule in the case of Plaintiff in Error (Shiver) who was convicted as determined by Toulmin (D. Ct. J); *or by the rule laid down in the aforementioned circular of the Land Department, which is charged by Congress with preparing the necessary rules and regulations to carry the Act into effect?*

It is claimed by counsel for the Government, that because a number of District and Circuit Courts cited by him have assumed jurisdiction to prosecute homesteaders under 2461, that they must of necessity have considered the questions presented by plaintiff in error. That after lands were entered under the homestead law they were appropriated lands and withdrawn, severed and segregated from the public domain. (Defendant's brief p. 29). *In answer it is submitted that the decisions of Courts clearly show or ought to show the questions before them.* Certainly no Federal Judges, during the last twenty years, have had larger experience in cases precisely similar to the case at Bar, than Pardee, Circuit Judge, and Bruce, District Judge, who were two, of the three Judges, of the Court of Appeals that certified the questions now before this Court. When the questions were discussed before them, their certificate shows that they were unable to determine the case, and it is certainly fair to the eminent Federal Judges, living and dead, cited by counsel for the Government, to concede that no such questions were submitted in connection with

the cases they decided, and which are cited in his brief. *Lands of the United States can not be appropriated and unappropriated at the same time. They can not be subject to sale, entry and disposal, and not subject to sale, entry, and disposal, at the same time.* Upon the theory of counsel for the United States, when the homestead right attaches, there is no distinction between the land covered by the entry, and unappropriated lands of the United States. *That although it is entered, it is still subject to entry; although it is disposed of, pursuant to an Act of Congress, it is yet subject to disposal; although by numerous decisions of the Supreme Court, it is withdrawn, severed and segregated from the public domain, it still remains a part of the public domain,* It is submitted, no argument is necessary to point out the absurdity of that position. He overlooks entirely that the phrases in 2461, R. S. "on any lands of the United States," and, "from any other lands of the United States" have been held by the Courts to refer to *public lands* and to *the surveyed national domain* held forth by the Government for entry and sale, in contradistinction to other real estate belonging to the General Government, such as dock yards and arsenals, etc., etc.

6 McLean, pp. 41, 48, 49 and 58.

Whether or not lands lawfully entered under the homestead law were appropriated lands, or lands withdrawn, severed, or segregated from the National Domain, does not appear to have been considered at all in Whitney against Taylor, 158 United States page 88; but on the contrary that case cites with approval R. R. Company against Whitney, 132, United States, 357; and other decisions of the Supreme Court, wherein it is distinctly decided that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of the public lands.

On page 33 of this brief, counsel for the Government admits that the Land Department is "charged with the duty of supervising the alienation of the title of the Government and the protection of Government lands." If the protection of Government lands, as thus conceded, be the duty of the Land Department, as thus claimed, then the circular of the General Land Office, above quoted, which provided a complete machinery for such protection, is not only pursuant to the plain provisions of the Statute,

but in accordance with the opinion of the Supreme Court, in Steel against the Smelting Company, 106, U. S. p. 447, wherein it is decided that the Land Department must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title or the entry of the land, and whether it is of the class which is open to sale.

It is conceded that the same act may give rise to a civil action and a criminal prosecution. *But it is insisted that the penalties prescribed by section* 2461, *cannot be enforced for the cutting and removal of timber from any lands of the United States that do not strictly constitute a part of the public domain.* That is from lands that are within the *disposing* power of Congress and are subject to entry and sale. If the remedies provided in the homestead act itself, as administered under the rules and regulations of the Land Department, the action of waste, injunction to prevent waste, the enforcement of the seventh section of the original act for filling false affidavits in making the entry, and the power to cancel the entry, be insufficient to protect the timber upon homestead entries, pending the entry, then it is submitted that no law on the Statute book exists whereby that protection can be given. It is insisted that the homestead law and section 2461 R. S., can not stand together. *They can not be enforced at the same time, upon the same land, in the same tribunal.* They are not embraced within the rule whereby two acts relating to the same subject are to be construed in pari materia as if they form parts of the same Statute. *Their provisions are inconsistent, irreconcilable, and repugnant.* When the provisions of two acts affecting the same subject, are irreconcilable and repugnant, the latter must be held to repeal the former act so far as it applies.

Potter's Dwarris, p. 145.

The homestead law, therefore, by this well-known rule of construction, must be construed to repeal the provisions of section 2461, R. S., to the extent that an entry under said law subsists. They are inconsistent, in this, *that land entered under the homestead law is appropriated, severed, withdrawn, segregated, not subject to sale, entry or other disposal by Congress. The lands referred to in* 2461 *are vacant, unappropriated, and lands subject to entry, sale,*

and disposed. They are irreconcilable Acts. The Secretary of the Navy under 2461, may permit timber to be cut and removed from the unappropriated lands of the United States. He would have no such power to permit the cutting or removal of timber from a homestead entry pending its lawful occupation by the entryman. They are repugnant, because under the penalties of 2461, a citizen for cutting and removing timber from the public lands of the United States, may be imprisoned for twelve months; under the homestead law, an absence of six months, operates as a forfeiture of the entry.

It is said that the only judgment of the Land Department in this case was "that defendant had made a proper entry." "As to what rights, in respect of cutting timber, this vested him with as against the Government, the Land Department did not and could not in allowing an entry, render a judgment." The very certificate of the entry itself, obtained by the homesteader, when he initiates his right, has printed upon it, as the judgment of the Land Office Department, *precisely the timber, the entryman may or may not cut upon his entry.* And those marginal written or printed notes are precisely in conformity to the circular of the General Land Office hereinbefore quoted. While the entry subsists unassailed, it imports good faith, and until the Land Department acts upon it, said good faith can not be questioned in the courts, in a prosecution under 2461, R. S., and the courts say "so long as it remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregrates it from the public domain," and it is only upon lands embraced in the public domain that section 2461, R. S. has any field of operation.

If the act of March 2, 1831, section 2461, R. S., was before this Court now for the first time, it would be submitted, with great respect, that its only application was to timber useful for the Navy, growing upon lands of the United States. Not only the phraseology of that portion of the Act incorporated in 2461 R. S., would seem to imply that such was its true interpretation, but the last clause providing that all fines and forfeitures should be collected by the Secretary of the Navy would confirm that

view. However, as this Court in United States vs. Briggs, 9 How., p. 171, in a brief opinion, has otherwise decided, the scope of the Act in that view, will not be presented.

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